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Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1322

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STANLEY FLEISHMAN*
BARRY A. FISHER
FLEISHMAN, FISHER & MOEST
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 557-1077

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Court must accept the District Court's Finding of Fact that the City of Whittier's adult business zoning ordinance denied respondent a reasonable opportunity to exhibit constitutionally protected films in the City, because it is not clearly erroneous.

2. Whether the Ninth Circuit correctly held that the City of Whittier's ordinance, regulating the location of adult motion picture theaters, violated the First Amendment because it effectively denied respondent a reasonable opportunity to open and operate a theater exhibiting constitutionally protected adult films within the City.

3. Whether the Ninth Circuit correctly held that the District Court had not abused its discretion in awarding attorney's fees, with interest, to respondent for successfully obtaining a ruling that petitioner's ordinance violates the First Amendment.

LIST OF PARTIES

Petitioner has listed the parties interested in this matter.

Respondent Walnut Properties, Inc., has no parent company, subsidiary, or affiliate to list pursuant to Rule 28.1.

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THE CITY OF WHITTIER, a Charter City,

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WALNUT PROPERTIES, INC.,
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Walnut Properties, Inc., a California corporation respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 861 F.2d 1109 (1988).

COUNTERSTATEMENT OF THE FACTS

A. Ordinance No. 2257 – the Ordinance involved in *Walnut Properties, Inc. v. City of Whittier*, No. CV-81-2262-R.

In May 1977, respondent began operating a theater exhibiting constitutionally protected "adult" films in the City of Whittier. This caused a lot of "agitation" by some groups in the City who didn't want to have any adult theater in Whittier. A delegation consisting of a city councilwoman, a member of a citizen's group called Citizens for Decency Through Law, and the executive director of the Whittier Uptown Association was formed and they visited respondent's president, suggesting that respondent discontinue exhibiting adult films. When the suggestion was rejected, petitioner enacted an "emergency" ordinance on June 21, 1977, imposing locational restrictions on adult businesses. App. T.

The ordinance allowed petitioner's Planning Department time to study the problems associated with adult businesses, and to consider potential zoning remedies. A study was conducted, and it revealed that 13 adult businesses were located within the City boundary; these operations included respondent's adult motion picture theater, adult bookstores, massage parlors, and nude model studios. The study indicated several undesireable secondary effects associated with massage parlors and nude model studios, but none associated with adult theaters, or adult bookstores.

On March 24, 1981, following the study, petitioner enacted Ordinance No. 2257. App. P.[1] The ordinance prohibits adult businesses within 500 feet of residential lots and establishments holding liquor licenses, and within 1000 feet of schools, churches, parks, or other adult businesses. The ordinance also provides "[t]hat prior to establishing or conducting of any adult business, a conditional use permit therefore shall be obtained." App. P-2.[2] On May 7, 1981, respondent filed an action in the District Court claiming that the ordinance was invalid as applied to its theater located within 1000 feet of a church. Following a full trial, the District Court entered its Findings of Fact and Conclusions of Law on March 9, 1984. App. N. On January 12, 1987 the District Court entered new Findings and Conclusions following remand. App. F.

The District Court stated that petitioner's Planning Director "testified that the City had no evidence to support a finding that a church would suffer any adverse effect because it was located within 1000 feet of an adult theater." App. F-10. He further testified that there was

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[1] An earlier ordinance, enacted February 7, 1978 (App. R) was declared unconstitutional by a Judge of the Superior Court of the County of Los Angeles, State of California. See App. P-1 ("[T]he City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void. . . .")

[2] The District Court found that the obligation to obtain a conditional use permit put "the burden on an applicant to *demonstrate* that there is a need to establish an adult business at the particular location." App. F-12-13 (emphasis in original).

nothing shown that would be a specific problem between respondent's theater and a church, and that the "operational characteristics" of an adult theater "are similar to those of other kinds of theaters, and . . . the only difference between them is that an adult theater limits admission to adults and shows more sexual material." App. F-10-11. The District Court found that neither petitioner's study nor its testimony at trial justified prohibiting a single adult theater from operating within 1000 feet of a church, adding: "it appears that the City acted on mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." App. F-11.

The District Court noted that petitioner's Director of Planning sought to justify the church-adult theater separation, stating that the proximity of an adult theater to a church created a "morals" conflict and that "most churches were against the display of the human body . . . for anyone that wants to view the human body and acts." App. F-8.

The District Court found that the church-adult theater separation made it impossible to operate an adult theater in the central business district of the city because there is no location in that area which is not within 1000 feet of a church, school, or park or within 500 feet of a residential area. App. F-11. Additionally, the Court stated that since respondent had the only theater in the city exhibiting adult films, its elimination would leave the city without any theater showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the city. App. F-11.

The District Court also ruled that the city failed to meet its burden of proving that its decision to separate a

church and an adult theater by 1000 feet furthers a substantial zoning interest. App. F-11.

B. Ordinance No. 2327 – the Ordinance involved in *Walnut Properties, Inc. v. City of Whittier*, No. CV-84-5067-R.

On March 15, 1984 – less than a week after the Court made its Findings of Fact and Conclusions of Law declaring Ordinance No. 2257 unconstitutional, petitioners initiated proceedings to re-enact the ordinance. App. I-3-4. Petitioner's Planning Director sought new evidence to justify the 1000 foot church-adult theater separation by soliciting comments from several church officials. One response was from the senior minister of the First Baptist Church who wrote in relevant part:

> I have received your letter of March 1st concerning the City's ordinance relating to the establishing of adult businesses. The City is involved in litigation against the Pussycat Theater in uptown Whittier, seeking to close this establishment because of regulations covered in the ordinance . . . . After considerable . . . discussion, the Board voted unanimous agreement with the action of the City of Whittier in seeking to close the Pussycat Theater in uptown Whittier. We feel that this "adult business" is completely incompatible to our church and its attempt to influence Whittier to continue to be a community of upright moral citizens.

App. F-9-10.

Based on this "new" study petitioner enacted Ordinance No. 2327 on May 22, 1984. "That ordinance essentially amounted to a re-enactment of the previous ordinance held unconstitutional by the District Court just two months earlier. . . ." App. A-6.

In response to this new ordinance respondent filed another action in the District Court on July 10, 1984, attacking the constitutionality of Ordinance No. 2327. Respondent sought: (1) a declaration that the ordinance was invalid insofar as it prohibited an adult theater from operating within 1000 feet of a church; (2) an injunction against enforcement of the ordinance; and (3) damages against the City, City Attorney Flandrick, and Planning Director Porter.

On July 15, 1985, the District Court heard cross motions for summary judgment.[3] Respondent sought partial summary judgment to declare Ordinance No. 2327 unconstitutional, and petitioners sought summary judgment declaring the ordinance constitutional. Additionally, petitioners sought summary judgment giving the individually named defendants immunity. On September 13, 1986, the Court filed its order granting respondent's motion, declaring Ordinance No. 2327 unconstitutional, and denying petitioner's motion for immunity. App. I. Petitioners appealed from the Court's order denying the individually named defendants immunity.

C. The Court's Order Vacating *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1042 (9th Cir. 1985)

On March 3, 1986, the Court vacated the judgment in *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1020 (9th Cir. 1985) (table) and remanded to the Ninth Circuit for further consideration in light of *City of Renton v. Playtime*

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[3] On May 14, 1985, the Ninth Circuit filed its memorandum affirming the District Court's judgment in *Walnut Properties, Inc. v. City of Whittier*, CV-81-2262-R. App. I-5.

Theaters, Inc., 475 U.S. 41 (1986). *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986).

In accordance with this Court's mandate, the Ninth Circuit vacated the District Court's judgments in both cases and instructed the District Court on remand to reconsider the evidence in light of *Renton*. App. G and H. The District Court complied. App. D and F. The District Court again found the challenged ordinances unconstitutional, demonstrating at length that they denied respondent a reasonable opportunity to operate its theater in the city. Petitioner appealed both cases and the Ninth Circuit consolidated them for appeal.

D. The Ninth Circuit's Ruling that both Ordinances are unconstitutional because they deny respondent a reasonable opportunity to operate its theater within the City.

On November 9, 1988, the Ninth Circuit rendered its opinion upholding the District Court's conclusion, that both ordinances are unconstitutional, relying on the District Court's finding that they "denied [respondent] a reasonable opportunity to operate its theater within the City." App. A-12.

1. The District Court found that "[t]he record demonstrates conclusively that the City's ordinance substantially restricts First Amendment interests, and was intended to do so." App. F-11. The District Court observed that petitioner's report in justification of its ordinance, stated that it was "quite obvious" that requiring an adult theater to be separated from a residential area by 500 feet "will have the effect of making *all* existing adult businesses, with the exception of [respondent's]

theater uptown, non-conforming uses subject to abatement." App. F-11-12 (District Court's emphasis). The Court stated that by prohibiting respondent from operating its theater uptown, because it is within 1000 feet of a church, "the Ordinance then has the effect of making *all* existing adult businesses, including [respondent's] theater subject to abatement." App. F-12 (emphasis in original).

The District Court discussed the disagreement between the respondent's expert Mr. Metcalf and the City's expert Mr. Porter, as to the availability of locations where an adult business could locate under the ordinance. Mr. Metcalf testified there were only 12 acres where an adult business could locate under the ordinance. Mr. Porter testified that the ordinance left 99.5 acres available in the industrial and manufacturing zones. Mr. Metcalf testified that the bulk of this acreage was not available for an adult theater because of the presence in the area of Nellie's School for Boys, the Palm View Assembly of God Church, and the Presbyterian Community Hospital. App. F-12. The District Court questioned whether Mr. Metcalf was correct in considering the Presbyterian Hospital and Nellie's School for Boys a church because each had a chapel. Nevertheless, the District Court stated, "it makes no sense to force [respondent] to move its theater from downtown because it is within 1000 feet of a church and have it locate within 1000 feet of the Presbyterian Hospital and Nellie's School for Boys." App. F-12. In this connection the Court noted that the ordinance requires *all* adult businesses to obtain a conditional use permit, thus putting the burden on respondent "to *demonstrate* that there is a need to establish an adult

business at the particular location." App. F-12-13. (Emphasis in original.)

Mr. Metcalf testified that the severe location requirements of petitioner's ordinance plus the conditional use requirement made it "impossible to establish an adult theater in Whittier, because there was no way one could persuade the Whittier authorities that there existed a 'demonstrated need' for an adult theater in the city." App. F-13. The District Court found that "[i]t is unlikely that the city would grant a conditional use permit to operate an adult theater within 1000 feet of the Presbyterian Hospital or [Nellie's School]." App. F-13.

Messrs. Porter and Metcalf also disagreed as to whether an adult business could locate within the Whitwood Shopping Center. Mr. Metcalf testified that according to the records of the assessor, every parcel in the Whitwood Shopping Center was owned by the same owner, and that it was a single lot and therefore the shopping center was not available for an adult business. The District Court stated that "[e]ven if Whitwood Shopping Center is deemed to consist of separate lots, as Mr. Porter testified, it is unlikely that [petitioner] would grant a conditional use permit to operate an adult business in the shopping center." App. F-13. The District Court went on to state that while theoretically there may be space in the shopping center which is more than 500 feet from a residence, there is no space where it is less than 1000 feet from a residence. The District Court stated that there was "no logic in forcing the removal of Walnut's theater from the downtown area because it is within 1000 feet of a church and permitting its relocation in the Whitwood Shopping Center where it would be within 1000 feet of a

residence." App. F-13. Mr. Metcalf also testified that areas Mr. Porter said were available for an adult theater, were in fact not available because the lots would have to be first subdivided before an adult business could locate in said area. App. F-14.

The District Court basically accepted the testimony of Mr. Metcalf and found "that there is only approximately 12 acres in Whittier where an adult theater might locate consistent with the ordinance." App. F-14. The Court stated that the effect of the ordinance was to substantially restrict respondent's opportunity to operate an adult theater in the city, adding that if an adult theater or a massage parlor were to open within the 12 available acres respondent would be precluded from operating its theater because the ordinance prohibited one adult business from operating within 1000 feet of another adult business. App. F-14.

The Court stated that petitioner's assertion that respondent could operate an adult theater in the city, other than where it was located was "sheer pretext." App. F-14. In short the District Court found that the purpose and effect of the ordinance, as it applied to respondent's theater, was "to greatly restrict lawful speech in violation of the First and Fourteenth Amendments." App. F-14.

2. The Ninth Circuit recognized that it was required to accept the District Court's factual findings because they are not clearly erroneous. Nevertheless, for the purposes of argument, the Circuit used the evidence most favorable to petitioner, that is, the 99.5 acre figure advanced by petitioner's expert Mr. Porter. App. A-13. The Court noted that under the terms of the ordinance an

estimation of total available acreage is next to meaningless because even accepting the city's presumptions regarding the availability of certain sites there were only three areas in which adult businesses might locate. App. A-15. "[T]ogether the areas would only allow a small handful of adult businesses to operate within the city, in light of the required 72-acre buffer zone imposed by the ordinance." App. A-15. As the Court noted "[a] circle with a radius of 1000 feet encompasses approximately 72 acres." App. A-14, n.4. The Court concluded that "[t]o hold, as the City argues, that there are adequate alternatives available for expression" of adult films "would make a mockery of First Amendment protection and would render meaningless the Supreme Court's admonition that an ordinance must not 'effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city.' " App. A-16.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE FINDINGS BY BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT THAT PETITIONER'S ADULT BUSINESS ZONING ORDINANCE FAILS TO PROVIDE RESPONDENT WITH A REASONABLE OPPORTUNITY TO OPERATE ITS THEATER WITHIN THE CITY ARE FULLY SUPPORTED BY THE EVIDENCE AND ARE NOT CLEARLY ERRONEOUS.

BOTH COURTS FULLY CONSIDERED AND CORRECTLY APPLIED *CITY OF RENTON V. PLAYTIME THEATERS, INC.*, 475 U.S. 41 (1986).

In *Renton, supra,* at 53-54, the Court held that an ordinance regulating the location of adult motion picture

theaters violates the First Amendment if it effectively denies theater owners a reasonable opportunity to open and operate an adult theater within the city. The District Court found that petitioner's ordinance denies respondent a reasonable opportunity to operate an adult theater within the city and this finding is supported by detailed subsidiary findings. App. F-11-14.

In *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985) the Court explained that the "clearly erroneous" rule precludes a reviewing court from reversing the finding of a trier of fact even if "it is convinced that it would have decided the case differently." *Id.* at 573. A reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the District Court because the role of the appellate court "is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 393 U.S. 100, 123 (1969). When "the district court's account of the evidence is plausible in light of the record viewed in its entirety, [an appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bessemer City, supra,* at 574. Where, as here, "there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Ibid.; *United States v. Yellow Cab Co.,* 338 U.S. 338, 342 (1948). The "clearly erroneous" rule applies even when the district court's findings are based "on physical or documentary evidence or inferences from other facts." *Bessemer City, supra,* at 574. Deference is due the District Court, as the original finder of fact, because "[t]he trial judge's major role is the determination of fact, and with

experience in fulfilling that role comes its expertise." Ibid.

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; "For only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Bessemer City* at 575. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Ibid.

In the case at bar the District Court credited the testimony of respondent's expert witness Mr. Metcalf stating:

> The Court basically accepts the testimony of Mr. Metcalf and finds that there is only approximately 12 acres in Whittier where an adult business might locate consistent with the ordinance. The effect of the ordinance is to substantially restrict Walnut's opportunity to operate an adult theater in the city. If, for example, an adult bookstore or massage parlor were to open within the 12 acres, Walnut would be precluded from operating, because of the prohibition against the concentration of adult businesses. In short, the ordinance denies Walnut a reasonable opportunity to exhibit constitutionally protected films.

App. F-14.

As already noted, "[f]or the purposes of argument" the Ninth Circuit used "the evidence most favorable to

the city," because it found that the difference of opinion between the experts had "no impact on the result" it reached. App. A-13. The Ninth Circuit noted that the ordinance had a double whammy: it imposed a 1000 foot separation requirement between any two adult businesses, thereby preventing such businesses from clustering within a given area, and at the same time severely limited the location where an adult business might operate. Under the ordinance there was at most "just three areas in which adult businesses may locate." App. A-15.[4]

In light of the double restriction, the Ninth Circuit found it "quite obvious that together the areas would allow only a small handful of adult businesses to operate within the city . . . in light of the required 72-acre buffer zone imposed by the ordinance." App. A-15.[5]

The Court concluded that enforcement of the ordinance as to respondent's theater would force the only existing adult theater in the city to close at its present location with no reasonable prospect of a place to relocate. App. A-19. Accordingly, the Ninth Circuit affirmed the District Court's conclusion that the petitioner's ordinance is unconstitutional because it not only effectively denies respondent a reasonable opportunity to open and operate an adult theater within the City, "but it also

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[4] The Ninth Circuit noted that one of the three areas might not be available but for the purposes of its analysis it assumed it was available. App. A-15, n.6.

[5] In reaching this conclusion the Ninth Circuit did not engage in any inquiry whatsoever as to whether the allegedly available sites were "presently available for sale or lease," or likely to be available in the future. App. A-16.

would force the closure of all adult businesses existing at the time the ordinance was passed." App. A-19.

It is plain that both the District Court and the Ninth Circuit studiously applied the Court's teaching in Renton. In the end petitioner wants this Court to overstep the bounds of its duty under Rule 52(a) and re-weigh the evidence.

II.

PETITIONER'S CONTENTION THAT RESPONDENT IS NOT ENTITLED TO THE FEES AWARDED WITH INTEREST IS FRIVOLOUS.

A. On May 21, 1984, the District Court awarded respondent fees in the sum of $39,035.00 for services rendered in the District Court for succeeding in invalidating petitioner's ordinance. App. B-2. The Ninth Circuit affirmed this fee award on September 30, 1985. App. L-9-12. The Court found that respondent's hourly rate was reasonable "for a case which wound its way through five different courts and for an attorney who has orally argued 10 cases before the United States Supreme Court, who has practiced for 35 years, and who has been awarded $200 per hour in another matter." App. L-9-10. Addressing petitioner's contention that respondent spent hours on "unsuccessful claims" the Court stated:

> In this case, as the District Court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the District Court.

App. L-10. Addressing petitioner's contention that respondent did not have adequate documentation, the Ninth Circuit stated that the District Court did not abuse its discretion in determining that the documentation was adequate. App. L-11.

Petitioner argues that respondent should be denied the fee award for successfully trying the case in District Court because the Findings and Conclusions entered March 9, 1984, were vacated when the Ninth Circuit remanded the case to the District Court for reconsideration in light of *Renton*. On remand, relying on the trial record, the District Court again found the ordinance unconstitutional. Petitioner's contention that respondent should be denied fees for services rendered in winning the case on trial is plainly frivolous.

B. On January 21, 1986, the District Court awarded respondent the sum of $25,478.00 for services rendered in the Ninth Circuit in connection with the appeal which culminated in the amended memorandum of September 30, 1985. App. L. Respondent was clearly the prevailing party in that case.

Petitioner contends that the fees for this appeal should be denied because this Court vacated the Ninth Circuit's judgment, and remanded for reconsideration in light of *Renton*. *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1132 (1986).

Petitioner acknowledges that respondent "was successful after remand in persuading the District Court and the Ninth Circuit of the merits of its claim." Petition for Cert. at 19. The vacated judgment was plainly a necessary

stepping stone to respondent's ultimate success. Accordingly, fees are appropriate for work done on the appeal.

C. The District Court awarded interest on the fees from the date the original award was made. This was necessary to make the fee reasonable. On May 21, 1984, the District Court awarded respondent $39,035 for work performed in the District Court from May 7, 1981, when the complaint was filed, to May 21, 1984. After the case had travelled up and down the judicial ladder, the Court reinstated the fee award of $39,035. Interest on that sum was compelled to make the award reasonable. The same is true with regard to the fee award made January 21, 1986, for $25,478. Without the interest the award would have been unreasonably low.

CONCLUSION

For the aforesaid reasons, the petition for writ of certiorari should be denied.

Dated: March 14, 1989

Respectfully submitted,

FLEISHMAN, FISHER & MOEST
STANLEY FLEISHMAN
BARRY A. FISHER

Attorneys for Respondents